

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	Docket#	
BELFIORE,	:	14-cv-4090-JBW-RML
Plaintiff,	:	
	:	
- versus -	:	
	:	
THE PROCTOR & GAMBLE COMPANY,	:	February 9, 2015
Defendant.	:	
-----X		

TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE ROBERT M. LEVY
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

For Plaintiff
Belfiore:

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1 THE COURT: We're here on docket number 14-cv-
2 4090, Belfiore v. Proctor & Gamble Company.

3 Will counsel please state their appearances for
4 the record.

5 MR. LEVY: For the plaintiff, it's Lester Levy
6 from the Wolf, Popper firm and on the phone is Matt
7 Insley-Pruitt and Robert Plotsky.

8 MS. HENN: Good afternoon, your Honor.

9 For the defendant Proctor & Gamble Company is
10 Emily Henn from Covington & Burling and with me is my
11 colleague Claire Dean.

12 THE COURT: Great. Okay. So, Ms. Henn, were
13 you in the middle of brining up other issues when I had
14 to adjourn for a guilty plea?

15 MS. HENN: I think that we had finished talking
16 about the first issue that Mr. Levy had raised and I
17 don't recall that I was in the middle of talking about an
18 issue but I think that what might make sense is in that
19 next step is for Mr. Levy to tee up the next issue that
20 he wanted to discuss, if that's all right with your
21 Honor.

22 THE COURT: Sure. And I should I be referring
23 to your joint letter at this point?

24 MR. LEVY: Yeah, the letter of January 2, your
25 Honor.

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1 THE COURT: Yes, I have it. Okay. Please go
2 ahead.

3 MR. LEVY: All right. So this is Lester Levy.
4 The first issue is raised on page 9 of that
5 letter.

6 THE COURT: Uh-hum.

7 MR. LEVY: It's at the bottom of the page. It
8 deals with document request number 16.

9 THE COURT: Got it.

10 MR. LEVY: And what we're seeking is any
11 government inquiry or investigation concerning the
12 ability of Freshmate to pass through plumbing, sewers and
13 septic tanks, which obviously goes to the heart of this
14 case.

15 P&G is taking the position that they'll give us
16 any inquiries or investigations having to do with New
17 York State but nothing outside New York State. Now,
18 since the product they sell, this Freshmates, is uniform,
19 they sell it throughout the United States, obviously if
20 there's a federal investigation or if there's an
21 investigation in any other state about the flushability
22 of this product, it's relevant to this case whether it's
23 a New York State investigation or a New Jersey
24 investigation or a California investigation or a federal
25 one. So we don't believe Proctor & Gamble's objection

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1 has merit.

2 THE COURT: All right. So are you -- Ms. Henn,
3 what's your position? I'm reading it here but why do you
4 think it's not relevant or reasonably calculated to lead
5 to the discovery of admissible evidence?

6 MS. HENN: Your Honor, our position is just
7 that, you know, on this expedited schedule, we have
8 already produced over 17,000 documents and, you know, in
9 the other case, my understanding from publicly filed
10 letters is that the other defendants have produced, you
11 know, just a fraction of that many documents and we've
12 tried to impose reasonable limitations. This is a case
13 in which plaintiff is seeking to certify a class of New
14 York consumers. So this was a limitation that we thought
15 was reasonable to help reduce the burden and the cost of
16 discovery.

17 THE COURT: Do we know how extensive the
18 discovery is and where there have been investigations
19 outside of New York?

20 MS. HENN: I am not versed in any sort of
21 investigations that may have been conducted by state
22 municipalities, other than, you know, outside of New
23 York. And aside from that, I think there may be a
24 federal agency investigation or at least an inquiry into
25 related issues.

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1 THE COURT: All right. It appears to me that
2 this is clearly relevant and if the question is is it too
3 burdensome for an expedited schedule, I would want to
4 know what the burden really is. It's difficult for me to
5 evaluate a claim of burdensomeness if (a) I don't know
6 how extensive the other state and federal investigations
7 are and (b) how easy they are to produce.

8 MR. LEVY: Sure. And, your Honor, the document
9 requests were served months ago. So if they had done it
10 correctly the first time, they wouldn't be faced with a
11 problem with that timing.

12 MS. HENN: Well, just to respond to your
13 question, your Honor, I think what's burdensome is sort
14 of the searching and having to look for any documents,
15 you know, as plaintiffs has requested that relate to
16 these investigations. I think if we were to confine it
17 to the federal inquiry, that would not impose undue
18 burden and we would be prepared to produce documents
19 related to the federal inquiry and insofar as it relates
20 to Freshmates, that would be something that we would be
21 prepared to do as a way to meet in the middle here.

22 THE COURT: Mr. Levy?

23 MR. LEVY: Well, your Honor, I would assume
24 that a company like Proctor & Gamble, the legal office
25 would have files on all these investigations. They would

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1 be in one place to make a search for it. And obviously
2 an investigation by the State of California, or the State
3 of New Jersey that sheds evidence on whether these
4 products are flushable or not is highly relevant.

5 So obviously, we would welcome the federal
6 investigation information but anything else that they
7 have that's accessible should be produced.

8 THE COURT: Yeah, I agree. Unless there's some
9 demonstration that these aren't easily accessible
10 documents which I find unlikely, I think these documents
11 should be produced, absent some showing of extensive
12 burden.

13 MS. HENN: Understood, your Honor, thank you.

14 MR. LEVY: Your Honor, is there any way we can
15 know when they'll be produced because we are running into
16 deadlines for filing the class motion.

17 THE COURT: Right. Ms. Henn?

18 MR. LEVY: Could we get ten days on that?

19 THE COURT: Ms. Henn, will that work for you?

20 MS. HENN: I think we can try to work with that
21 and as we said on Friday, with respect to the pricing and
22 attribute information, if we run into any difficulty, we
23 would be happy to raise that first with opposing counsel
24 and see if we can work out an agreement and if we're
25 unable to, we could come back to your Honor. But we're

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1 happy to target ten days in the first instance. I don't
2 know for sure we'll be able to do that but we'll do our
3 best.

4 THE COURT: Okay. Thank you.

5 MR. LEVY: Your Honor, the next issue would be
6 on page 11, the middle of the page. This is document
7 request 21, which seeks documents concerning reviews,
8 limitations, field studies, reports, memoranda conducted
9 by Proctor & Gamble as to the ability of Freshmate to
10 pass through plumbing, sewer and septic tanks.

11 They put an artificial date -- time frame from
12 which they're going to look for these documents and our
13 concern is no matter what the time frame is, if a report
14 exists that Proctor & Gamble -- was produced to Proctor &
15 Gamble dated a day before the time frame they're putting
16 on it that shows that this product is not flushable, is
17 highly relevant and should be produced.

18 So, we're a little leery about the time frame
19 that they want to assert on such a search. So it seems
20 to me if they have in their files, any document that
21 deals with any investigation or testing by Proctor &
22 Gamble on the flushability aspect, it should be produced
23 no matter when that testing took place.

24 MS. HENN: Your Honor, if I could respond? I
25 didn't want to preempt any questions the Court has.

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1 THE COURT: No, please. Thank you.

2 MS. HENN: Okay. So this dispute that
3 plaintiff has raised really gets into the time period for
4 electronically stored information and as I am sure your
5 Honor is familiar, any time you do a search broadly for
6 electronically stored information, you specifically do a
7 collection, you impose a time frame so that you can
8 reduce a collection, then you use targeted search terms
9 and review the material you end up with.

10 As plaintiffs have known since we served our
11 responses, our written response to the discovery request,
12 we imposed a very generous time frame which is actually
13 the same time frame Mr. Levy himself proposed on Friday
14 when we were discussing with your Honor the pricing data.
15 It's January 1st of 2011, which is almost six months
16 before the class period in this case, up until the date
17 of the collection, I believe.

18 So our view is that if you're going to go back
19 -- if the plaintiff wants us to go back and expand that
20 date range and, in fact, hasn't even suggested a proper
21 date they want all documents regardless of dates, that
22 that really gets to imposing tremendous costs on Proctor
23 & Gamble in part because we would have to redo this
24 enormous process that we've already been through and
25 expand it and recull the documents and reassemble an

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1 attorney review team. Plaintiff is not really pointing
2 to anything in particular. Our time period is quite, we
3 think, reasonable and by the time plaintiff's raised this
4 issue with us, we had already locked down our documents
5 for production on the expedited schedule by December 22nd
6 which we -- it took extraordinary efforts to meet that
7 deadline. So we would really face, we think, tremendous
8 and unwarranted costs if we were at this late date to
9 expand the period.

10 The one other point I would mention is of
11 course there are going to be documents in that collection
12 that do predate January 1st, 2011, you know, for example,
13 because they've been e-mailed at a later date and so
14 they're pulled out in the e-mail that's dated during the
15 period. It's not as if we've artificially pulled
16 responsive documents out of the ESI we searched on the
17 ground that they were predated January 1st, 2011 but
18 really a process like this requires reasonable
19 limitations. We think we've been very reasonable.

20 This ESI date question comes up not only on
21 page 11 but also on page 6 of the letter to your Honor
22 and we would just ask that, you know, at this late date
23 we be allowed to stand on the very reasonable period we
24 began with.

25 MR. LEVY: Your Honor, should I respond to

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1 that?

2 THE COURT: Yes.

3 MR. LEVY: Okay. Well, the late date is kind
4 of a red herring because this document request was served
5 I think months ago. If they have a study on whether this
6 product is flushable, again I would think that it's
7 probably located in one place in Proctor & Gamble.

8 If the study came out in December 2009, for
9 example, they say this product is not flushable. You
10 know, it shouldn't be labeled as such or whatever. We
11 won't get it, you know, unless she says that well, maybe
12 it's referred to in a later e-mail or it's referred to
13 late.

14 So there's nothing more highly relevant than
15 this document request to this case. And I said, there is
16 a concern when they put an artificial date on it and if
17 this search -- they don't have to reassemble thousands of
18 people and thousands of searches. We're looking for the
19 studies of the flushability and again, they're probably
20 located in one area at Proctor & Gamble. So it's highly
21 relevant and I think we should get it.

22 MS. HENN: And if I may respond just to those
23 limited points, your Honor.

24 THE COURT: Yes.

25 MS. HENN: These aren't -- I mean, Mr. Levy

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1 speculates that we have a file with studies. That's not
2 true. In fact, as I've mentioned, this is an issue of
3 ESI and electronically stored information and being able
4 to pull this.

5 I'm also not sure what Mr. Levy even means by a
6 study. This product has been on the market for, I
7 believe, at least a decade. Ms. Dean can correct me if I
8 am wrong about that. But of course it's been tested
9 throughout its life and has always met the testing that
10 was imposed by Proctor & Gamble to make sure that it was
11 flushable.

12 So I just think that essentially Mr. Levy is
13 arguing for unlimited ESI collection which is tens of
14 thousands of dollars that we're talking about imposing on
15 P&G at a very late date when we are hopeful that, you
16 know, we can stick to the schedule that's already been
17 extended once.

18 THE COURT: The tens of thousands of dollars
19 come from what specific operations?

20 MS. HENN: Sure. I'm happy to explain that.
21 It comes from the processing of data. So the data after
22 it's collected from custodians, has to be stored
23 somewhere and then if you want to bring it into a format
24 that can be searched, it has to be loaded into a system
25 and the vendor that handles the data charges a lot for

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1 that. And then the running of the search terms is
2 another cost that the vendor would charge. And then the
3 resassembling of the attorney review team, you know, I
4 think that's sort of an hourly contract attorney. And
5 then you get the attorneys at our firm who would look at
6 things to make sure, you know, they're relevant before
7 they are produced.

8 And then even just the production, they have to
9 be converted into a TIF format. So tens of thousands of
10 dollars is probably a modest estimate of the costs we're
11 talking about.

12 THE COURT: Mr. Levy, if you were to try to
13 devise a way to limit the costs but at least find some
14 way to identify relevant materials, how would you do
15 that?

16 MR. LEVY: Well, the search term would be very
17 limited. It's not like a set -- another set of document
18 requests. We're talking about any studies or analysis of
19 the flushability conducted by Proctor & Gamble. So
20 that's a very targeted search term and they probably do
21 have a testing facility or a division that deals with
22 testing of these products or even in the Freshmates
23 division.

24 So I can't imagine, you know, we're talking
25 about a lot of money. And effectively, if should have

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1 been -- there's nothing more relevant than that and it
2 should have been done months ago.

3 MS. HENN: Well, I'd like to point out that
4 plaintiff's initial document request read as follows:
5 "Unless otherwise specified, each request shall be deemed
6 to include documents prepared, written, received...from
7 May 23rd, 2011 to the present." So that's the class
8 period defined as "relevant period."

9 And then it goes on to say, "This shall be
10 construed to include documents concerning events or
11 circumstances during such relevant period even though
12 dated...prior to the relevant period."

13 So we felt in reviewing these requests that
14 plaintiff had appropriately focused on the class period
15 but we recognized that there could be things that were
16 dated just before that might be relevant and we went back
17 almost six months to January 1st. And instead of
18 contacting us right after getting our responses and
19 saying wait, we think it should be extended a month or so
20 earlier, plaintiff waited until our production was locked
21 down. So it's quite prejudicial.

22 And I can tell you because we've been through
23 this process once, the word flushable as a search term
24 turns up thousands and thousands and thousands of hits
25 because, of course, people e-mail and use that word.

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1 It's not a targeted -- it's not possible to just pull
2 out, you know, the kinds of documents Mr. Levy is talking
3 about.

4 They've got all of these documents for a very
5 long period of time, over four years and we think that we
6 were, in fact, more generous in their definition and
7 their instructions than their request would have
8 suggested.

9 MR. LEVY: I don't believe that specific
10 request had that time limitation on it, request number
11 23.

12 MS. HENN: Well it says, "unless otherwise
13 specified, each request" --

14 MR. LEVY: Right.

15 MS. HENN: -- "shall be" --

16 MR. LEVY: And what does that request say?

17 MS. HENN: I don't have it right in front of
18 me. Claire, do you have it?

19 MR. LEVY: I would doubt that --

20 MS. HENN: This is request number 8.

21 MR. LEVY: 23.

22 THE COURT: I have it.

23 MS. DEAN: I can try to pull it up now.

24 THE COURT: I have it in front of me. I don't
25 see a date.

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1 MR. LEVY: Request 23.

2 THE COURT: Yeah, I don't see a date for
3 request 23.

4 MS. HENN: So that would default to the
5 relevant period which was May 23rd, 2011 to the present.
6 And as I mentioned, we went all the way back to January
7 1st of that year.

8 THE COURT: Let me ask while you're looking,
9 when we talk about testing, is this internal testing by
10 P&G? Is this external testing by some outside vendor or
11 agency? Do we know who, if anyone, conducted such tests?

12

13 MS. HENN: Typically it was internal to Proctor
14 & Gamble, that they would test their products.

15 THE COURT: Is there a division that does that?
16 Is there a particular individual whose name might be
17 associated with such tests?

18 MS. HENN: There are people who do those tests
19 and they were chosen as custodians. And then some of the
20 test results that we collected would have been from a sort
21 of central repository, sort of the files of that person
22 but it was -- so we pulled it from both places, from the
23 ESI through the custodians and the search terms and then
24 from, you know, if there were a central repository.

25 And, of course, all this testing that was done

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1 back to January 1st of 2011 is the relevant testing for
2 the market -- for the product that was on the market
3 during the class period that the potential class members
4 would have purchased.

5 THE COURT: Did that product change?

6 MS. HENN: Yes, there have been changes. I'm
7 trying to think if there were any changes in the 2011
8 time frame and I'm not sure.

9 THE COURT: That might be one way to target
10 this would be if the product changed and there was some
11 testing done immediately prior to that time period, that
12 might be another way to collect it or --

13 MS. HENN: Yes.

14 THE COURT: Go ahead.

15 MS. HENN: My understanding is that the product
16 as it initially launched around -- approximately a decade
17 ago, would have been basically the product that was for
18 sale until somewhat recently, certainly during the class
19 period and I don't have the date at hand but when they
20 began testing potentially a new -- called a substraight
21 and I don't want to get too much into confidential
22 information but that's -- that would have happened, I
23 believe, during the class period. So everything they
24 have should apply to that.

25 And, in fact, I'm not sure that's on the market

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1 yet, so it's probably not of central relevance but
2 plaintiffs would have that information.

3 THE COURT: So is there a testing division at
4 P&G or an individual that you mentioned who is or several
5 individuals who would be the repositories for test
6 results or would review them?

7 MS. HENN: As I mentioned, yes, there would be
8 I think a few different people who are responsible for
9 this. They're in a larger division that does other
10 things as well and they would be -- that would be sort of
11 the most logical place I think to look for testing
12 information either in their ESI, their electronically
13 stored information or their -- directly in their files.

14 THE COURT: Would they know whether such tests
15 had been conducted and when they were conducted, if you
16 would ask them?

17 MS. HENN: They might, yes, yes. They probably
18 would. But I think it's been, you know -- there's been
19 testing going on since the product was launched. So I'm
20 not sure exactly what we're looking for. You know, I do
21 think that the cutoff we've imposed, particularly when
22 they define the relevant period to be the class period
23 was specifically designed to make sure to give plaintiffs
24 the testing that would be relevant to this case.

25 THE COURT: Well, I'm not sure about that. If

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1 there was relevant testing done, you know, a few years
2 before the class period that was applicable to the
3 product that was being marketed during the class period,
4 my guess is is that would be relevant under the
5 definitions of Rule 26.

6 And my concern is with your argument and I'm
7 trying to see if there's a way through either some kind
8 of discussions with the individuals involved who would be
9 intimately familiar with what testing was conducted over
10 a reasonable period of time and that would limit your
11 burden. Perhaps they might even be able to identify
12 those documents so you wouldn't have to spend a lot of
13 time, you know, with ESI. Again, I don't know -- that
14 might be a reasonable compromise but again, I'm not sure
15 what kind of testing was conducted and what it would look
16 like.

17 MS. HENN: I mean, I think we could go back --
18 if we're limiting it to testing, I think that would help
19 with the burden because then we wouldn't have to look
20 through e-mail, for example, so if we just went straight
21 to a central repository of just testing and test results
22 but I think we would still need the guidance from the
23 Court of how far back to go because it's been the same
24 product, as far as I'm aware and I can confirm that to be
25 sure but if it's been the same product on the market for

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1 a decade I think we are likely to run into a dispute
2 about how far back we have to go.

3 But we appreciate your Honor's willingness to
4 try to work with us to come up with something that would
5 not be as burdensome as to repeat the ESI search term
6 process and if we're just going to go to the central
7 repository for test results, we would appreciate guidance
8 from the Court as to how far back you think it would be
9 reasonable to go. The class period starts May 23rd of
10 2011 and we've given them back to January 1st, 2011.

11 THE COURT: Well, without seeing how the tests
12 are conducted, my instinct would be that at the time that
13 the product first came out on the market, there probably
14 was more extensive testing than was conducted during the
15 later period. I could be wrong about that. I don't know
16 if either counsel has a view on that. So it may be that
17 the initial testing would be what's most critical to what
18 plaintiff is looking for and then any subsequent, you
19 know, major re-examination of flushability issues.

20 MR. LEVY: I think that is correct.

21 MS. HENN: You know, I really do think it's
22 been going on without stop. You may be correct that
23 there's more at the beginning but I think that there has
24 been continual testing to really understand the state of
25 the art and the various technology and different methods

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1 of testing.

2 So I think we're looking at a really large
3 quantity of testing if we're going back all the way to
4 the product launch.

5 THE COURT: Well, I would think at the launch
6 you would probably have the most comprehensive test
7 results and if you cut off the discovery before the -- or
8 after the launch, then you might miss the most important
9 documents.

10 MS. HENN: Okay. So I just want to make sure I
11 understand the Court's ruling. It sounds like you would
12 like us to get testing from the launch and then are you
13 suggesting the entire decade or something else? I'm not
14 sure I understand.

15 THE COURT: Well, I haven't gotten to that yet
16 and I'm actually looking for your guidance on that, as
17 well. Do you think in talking to the people who were
18 involved with the testing, you would be able to find a
19 way to reasonably narrow it, so that it would provide
20 what the plaintiff's are reasonably entitled to without
21 an extensive burden? In other words, do you think that
22 your people --

23 MS. HENN: Yes.

24 THE COURT: -- would be able to identify the
25 documents that they're looking for?

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1 MS. HENN: I think it would be -- I think that
2 would be a helpful next step and I think we could focus
3 on testing for the launch. You know, sort of the
4 substantiation of the flushability or flushable claim
5 from the beginning and we can explore what we're looking
6 at after that and whether there's a reasonable way to
7 narrow it.

8 And I would also welcome from plaintiff since
9 they have the testing-types of documents, if there's a
10 particular kind of document that they have found
11 particularly relevant, to please share that with us
12 because that will help us target the search, as well.

13 You know, a lot of these things are quite
14 technical, so I don't know what plaintiff's use is of
15 these documents and which ones they think are
16 interesting.

17 THE COURT: Mr. Levy, what do you say?

18 MR. LEVY: I -- well, I don't know how to
19 explain to Proctor & Gamble what testing result document
20 they should be producing to us. Obviously, what we care
21 about is the conclusions reached and the support to the
22 conclusions but not down to the -- you know, every detail
23 as to whether this product is flushable or not flushable.
24 So I --

25

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1 MS. HENN: I was just suggesting --

2 MR. LEVY: I would think if there's a
3 testing --

4 MS. HENN: -- that since you have a lot of
5 these --

6 MR. LEVY: -- I would think if there's a
7 testing facility, they would have these documents handy
8 and your Honor's correct that there's -- I think the most
9 extensive testing would be at the launch of the product
10 but periodically, you know, they may be subject to
11 additional testing and we should get the results.

12 Obviously, there maybe a damaging document is
13 something there that says hey we're marketing this as
14 flushable and it's really not breaking down and
15 plateauing through pipes. So I don't want to miss that
16 document by finding something that I -- I am doing in the
17 dark essentially.

18 THE COURT: Would a quick telephone deposition
19 help you both or is it better just for counsel to go
20 through the P&G people?

21 MR. LEVY: Maybe we should speak to the person
22 on the phone. I don't now if we have to take a
23 deposition under oath but may be, you know, direct
24 contact with Ms. Henn on the line might suffice.

25 MS. HENN: I think we would be much more

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1 comfortable proceeding with counsel involved and, you
2 know, in the normal course. These people may well be
3 deposed but I think we feel that -- I was just suggesting
4 that since counsel already has four years of these types
5 of documents, that if there was a particular type of
6 document that was helpful or not helpful, it would be
7 helpful to know that but I hear Mr. Levy to say that
8 that's difficult for him and so, I would just propose
9 that I talk to our flushability testing experts and try
10 to come up with a proposal for -- and I hear, you know,
11 an interest in the launch, testing before the launch or
12 around the time of the launch, so we'll focus on that and
13 then for the remainder of the decade, a period, we will
14 try to come up with a narrower sort of way to get the
15 relevant documents to plaintiff. You know, as I
16 mentioned, I think they already have a lot of this
17 material and -- to work with but we can get them more.

18 THE COURT: Within the ten days?

19 MS. HENN: This will probably take longer but
20 we'll do it as quickly as we can. I'll have to consult
21 with the same person to see how quickly we can do it.

22 THE COURT: Okay.

23 MS. HENN: Is this material by the way,
24 important -- is this something that needs to be done for
25 class certification or are you focused on this issue in

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1 particular or is this something that more goes to the
2 merits because I don't know if there -- it would be
3 helpful to prioritize sort of what you need for your
4 motion.

5 MR. LEVY: I think this is relevant to both
6 class certification and the merits.

7 MS. HENN: Okay.

8 THE COURT: Okay. Next?

9 MR. LEVY: The next issue, your Honor, is
10 similar except it's not testing. It's basically
11 marketing and market research. So we're talking about
12 now on page 6, the plaintiff's position on the top of the
13 page. This has to do with any studies that Proctor &
14 Gamble has conducted as to whether a reasonable consumer
15 would understand the word flushable to mean. They put
16 the word flushable on their package. They market it as
17 flushable but the question is what does that mean to a
18 reasonable consumer? Does it mean you could flush it
19 down the toilet? Does it mean it goes through the pipes
20 without causing a problem? Does it mean it could go
21 through a septic tank without screwing it up?

22 So does Proctor & Gamble have such marketing
23 research? And again, there shouldn't be a time frame on
24 this because it's as relevant as the testing to this case
25 and it's probably located in one area, so we think it's

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1 relevant and we should get it.

2 THE COURT: Just -- I might have missed this
3 but which request are you talking about now, so I can be
4 sure we're on the same number?

5 MR. LEVY: This is request number 8. It's on
6 page 6.

7 THE COURT: Page 6, okay. And the last one,
8 did we identify the last one as number 23?

9 MR. LEVY: Uhm.

10 THE COURT: Document request 23?

11 MS. HENN: I believe it's 21, your Honor.

12 THE COURT: It's 21?

13 MS. HENN: Yeah, the testing.

14 THE COURT: 21.

15 MR. LEVY: That's 21 and 23, I think.

16 THE COURT: So both? You know, because 23
17 talks about testing, as well. I wasn't sure which one.

18 MR. LEVY: I think they both cover it. One
19 is --

20 THE COURT: Okay.

21 MR. LEVY: -- reviews, investigations, field
22 studies, assessments.

23 THE COURT: Okay.

24 MR. LEVY: So I think they overlap, 21 and 23.

25 THE COURT: Okay. But this one is on page 6

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1 number 8, correct?

2 MR. LEVY: Right, this one is 8.

3 THE COURT: Okay, go ahead.

4 MS. HENN: Judge, just to respond to Mr. Levy,
5 I think again we've given them -- we've responded to this
6 request. They have a lot of -- they have these documents
7 going all the way back to January 1st of 2011, almost six
8 months before the class period begins.

9 This one in particular where this is focused on
10 what consumers, you know -- any market research.
11 Unfortunately, these aren't located in any central place.
12 They're all over the place and we were able to locate
13 them using the same techniques I described and again, you
14 know, we think again where plaintiff has requested
15 documents for the relevant period, which plaintiff
16 defined as May 23rd, 2011 to the present, our having gone
17 back to January 1st, 2011, was a reasonable way to
18 capture the relevant documents and it's extremely
19 expensive to repeat this process, particularly when
20 plaintiffs themselves pointed us towards the relevant
21 period and we expanded it.

22 This case is like lots of class actions,
23 discovery is all one-sided. There's no downside to Mr.
24 Levy to just ask for more and put more and more costs on
25 my client and they have these documents. We gave them

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1 these documents and they go all the way back almost six
2 months before the class period.

3 So I mean it feels almost like Mr. Levy is
4 trying to just reopen discovery yet again when we were
5 under the impression that what Judge Weinstein had
6 ordered was that we should be expedited and try to
7 accomplish this quickly and without undue burden on
8 either side.

9 MR. LEVY: Your Honor, if I can respond?

10 THE COURT: Yes.

11 MR. LEVY: It's hardly a one-sided deposition.
12 I mean, our client, his wife, his plumber, were all
13 deposed. There were inspectors coming into his house
14 going through his toilet and his pipes. So it's not one-
15 sided discovery in this case.

16 As your Honor pointed out, it was at the
17 inception that this marketing research probably took
18 place because somebody had the idea of marketing this
19 product as flushable, putting it all over their product
20 covers and packages.

21 So I would guess, a reasonable guess, that they
22 do have these studies at the inception of the product and
23 when they decided to market it as flushable. So those
24 are the studies that we would like, if there would be a
25 study of what a reasonable consumer would consider being

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1 flushable and would be willing to pay for a flushable
2 product. So limiting it to years later doesn't get us
3 the information at is the most relevant to this case.

4 THE COURT: Again, I'm wondering if there isn't
5 some either division or individual who would have
6 institutional knowledge of which reports there were.
7 Maybe there is a report that is considered the bible and,
8 you know, it's supplemented a few years later and that
9 would be fairly discoverable or locatable.

10 Ms. Henn, do you have an idea whether that's
11 correct?

12 MS. HENN: Unfortunately, not. It's -- you
13 know, people change jobs and where the -- we have had to
14 do basically searches of electronically stored
15 information, using search terms.

16 For the person currently in the job who manages
17 research, market research, she has some limited
18 understanding of what exists but not back before the
19 class period. So I don't know of a targeted way to find
20 this.

21 And I just would repeat, I mean if plaintiff
22 wanted data back -- wanted these studies back to the
23 beginning of when this product was launched, I don't know
24 why plaintiff didn't request that. Plaintiff requested
25 documents from the relevant period.

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1 THE COURT: Uh-hum.

2 MS. HENN: And doing it this way, having us
3 respond by, in fact, expanding the period and then
4 plaintiff coming back and asking now for going back to
5 the launch, if he had asked for that in the beginning, we
6 would have met and conferred and likely held off
7 producing until we could get the Court's guidance because
8 it's extremely expensive to do this twice.

9 MR. LEVY: Well, we met and conferred on this
10 in December. So what is (indiscernible) --

11 MS. HENN: Yeah, after our production was
12 launched -- was all locked down. I think we served our
13 responses to you in early December and we didn't talk
14 about this, you didn't raise this issue with us until
15 December 19th, I believe, when the substantial completion
16 deadline was the 22nd.

17 But again, just going back to the initial
18 request, you didn't request things back to the launch.
19 You requested them back to the beginning of the class
20 period and we went almost six months earlier.

21 MR. LEVY: But the broad definition was
22 anything that relates to events that took place during
23 the class period which is marketing and this is -- is
24 flushing. So the studies you have on whether that
25 marketing, you know -- how that would be understood by

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1 the consumer would be called for. Any of this is highly
2 relevant and again, you should talk to somebody there to
3 see what exists.

4 MS. HENN: I have, Mr. Levy. That's what I was
5 just repeating.

6 THE COURT: All right. So that's unfortunate.
7 So I do understand, Ms. Henn, your position that had you
8 known earlier that the request was for a period of time
9 that predated the class period, you wouldn't have had to
10 do a second search or an expanded search.

11 So what -- assuming that the plaintiff does
12 really have an interest in finding out what these
13 original market research documents said, and your
14 difficulties in trying to find if there's someone with
15 any institutional memory who would have them or someone
16 who has some kind of an easily accessible file, what do
17 you suggest? What would be the best way to try to
18 approach this?

19 MS. HENN: Well, I would be happy to go back to
20 the person focused on the launch period and see what we
21 can find. And I think that would be a more productive
22 way to go about it than going back to the electronically
23 stored information which gets into the really, you know,
24 expensive processes we would have to invoke.

25 So I think the best thing I can suggest is that

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1 we attempt a targeted search where we go back to the
2 person who has responsibility for this, see what she
3 knows about her predecessor. Plaintiffs have deposed
4 her, so they had the opportunity to ask her these
5 questions to (indiscernible) but we can go back and ask
6 them and see what we can find in sort of a targeted way.

7 And I can't guarantee that we will have stuff
8 back from the launch because it's a long time ago but we
9 will certainly look for what is there and through a
10 targeted search, we would be willing to produce what we
11 can find.

12 THE COURT: Uh-hum.

13 MS. HENN: And we think that would probably be
14 a better way to go at this then going back to the
15 electronically stored information with the keyword
16 searches which are somewhat imprecise as they are.

17 THE COURT: Is there an individual who could be
18 identified who was employed at the time who might have
19 been either the custodian or the originator of a request
20 for these marketing surveys? Would that be --

21 MS. HENN: It's possible, your Honor. I just
22 don't know the answer to that but I can -- you know, what
23 I'm focused on is what the person who we've been working
24 with has but I can certainly ask her to identify to me
25 who that other person was and we can see if we can find

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1 them or if they're still at the company.

2 THE COURT: Okay. And perhaps that person has
3 files and can easily access these documents, one might
4 hope.

5 MS. HENN: All right.

6 THE COURT: Okay. What else?

7 MR. LEVY: Okay. Next is a grouping of issues
8 dealing with New York customers. These would be class
9 members who have contacted Proctor & Gamble and
10 complained about the fact that this product is not
11 flushable and has caused them problems.

12 We asked a series of questions. We asked for
13 interrogatories to identify those New York customers who
14 have contacted Proctor & Gamble, complained about the
15 product. And we also want their communications and
16 Proctor & Gamble's response.

17 Proctor & Gamble refuses to identify their
18 customers saying that they're concerned about the privacy
19 of the customers which makes little sense because there's
20 nothing in that information that's private. We're not
21 talking about Social Security numbers or income or
22 anything like that. We're just talking about complaints
23 about the product.

24 And Proctor & Gamble's own Web site says they
25 can use that information to defend Proctor & Gamble but

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1 obviously, they don't want to give it to the plaintiff
2 who is trying to collect money for these individuals. So
3 we want to identify those people. They will be witnesses
4 -- potential witnesses in this case.

5 Secondly, the communications back and forth
6 with Proctor & Gamble from these customers, we asked for
7 those and Proctor & Gamble says we'll give you our
8 summaries of those communications but we won't give you
9 the communications.

10 Well, the problem with that is that the
11 communications, especially from Proctor & Gamble back to
12 the consumers may contain admissions against interest
13 which would not be in their summaries. And also we've
14 taken the deposition as to whether there may be errors in
15 these summaries when you compare them to the original
16 communication and there have been, you know, at least an
17 instance or more that the person could remember off the
18 top of their head of errors.

19 So the communications are the best evidence of
20 what the consumers complaints are about this product and
21 of Proctor & Gamble's response and the identification of
22 the -- who these customers are would lead to potential
23 witnesses in the case. So we're entitled to that.

24 THE COURT: Ms. Henn?

25 MS. HENN: WELL, if I could respond, your

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1 Honor.

2 THE COURT: Yes.

3 MS. HENN: I think out of these three issues
4 Mr. Levy has identified, I can take one off the table
5 because we've already produced Proctor & Gamble's
6 responses to consumers. So plaintiff has that, where
7 there was a letter that went to the plaintiffs.

8 The spreadsheet that we produced to plaintiff
9 from our system of record which is not a self-summary,
10 it's actually where we track all of the calls that come
11 in, that spreadsheet indicates whether a response was
12 sent and for the cases that had responses, we went back
13 and pulled the letter and produced that. So I think that
14 one's not an issue. It should be a moot issue.

15 So that leaves two things Mr. Levy raised.
16 First, about identifying New York customers who had
17 called or e-mailed or wrote letters to complain about the
18 product and then the second is communications back, I
19 gather. So -- or no, identifying the customers and then
20 the actual communications.

21 So what we did in response to the request to
22 get complaint information was we went to our system of
23 record. Proctor & Gamble has a very robust system for
24 tracking calls and e-mails and letters. We produced from
25 that system a summary of calls that came about -- you

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1 know, that raised an issue about flushability from New
2 York. And then when plaintiffs asked that we give them
3 more than just New York, we went back and we produced,
4 you know, similar information nationwide.

5 As plaintiffs learned at the deposition, if a
6 person e-mails Proctor & Gamble, the text of the e-mail
7 is -- it goes into this system. So when we produced the
8 summary of the call or the complaint, in the case of
9 e-mails, plaintiff already has the exact text of that
10 e-mail. So I think e-mails really aren't an issue.

11 I think when somebody calls, the person -- and
12 it's usually at a vendor who takes the call, summaries
13 what was -- what the issue was and the summaries are
14 incredibly detailed and they explain what was happening.
15 Similarly, when letters come in, so they're not
16 electronic, a summary will be created and, you know, you
17 often even see the grammar errors that might have been in
18 the letter, actually in the summary. So these are highly
19 detailed records and they come from the system that
20 Proctor & Gamble uses to track these things.

21 What plaintiff wants in addition is the
22 original copy of the letter, I gather and they've gone so
23 far as to ask for audio recordings of phone calls that
24 came in and again, we're getting into territory of great
25 expense and a lot of time for Proctor & Gamble to have to

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1 go to its vendor to find out if the audio recordings even
2 exist and pull them and track exactly the case number to
3 the audio recording.

4 And I really -- plaintiffs have not explained
5 why an audio recording gives them more information than
6 the summary. Mr. Levy mentioned something about errors
7 in the system. The error that was talked about in the
8 deposition had to do with an entry in a spreadsheet where
9 apparently an agent had used the wrong product code. So
10 the response that went back to the customer had to do
11 with the Fabreeze Air Freshener product instead of the
12 Proctor & Gamble Freshmates product. It's not an error
13 that has anything to do with this case or really
14 restricts in any way, plaintiff's ability to use this
15 information.

16 We think that the way we did this and the
17 records that we gave them, they're the exact records
18 Proctor & Gamble relies on. They have great detail
19 about, you know, what happened.

20 And so, you know, we would ask the Court to
21 hold what we have done as reasonable and not require us
22 to go to the expense and, you know, taking the time to
23 try to find original communication.

24 The last issue that Mr. Levy raised is the
25 identity information. Plaintiff is seeking information

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1 that P&G may have about a consumer's name, address, e-
2 mail. We think this is precisely information that
3 consumers consider confidential. When they write into
4 Proctor & Gamble, you know, they're not expecting that
5 that data is going to be shared, unless compelled by law,
6 which is what our policy -- our privacy policy and
7 promises that we make to consumers on our Web site
8 states.

9 You know, we just think that what -- the
10 information that plaintiff wanted about, you know, who
11 calls and how many calls, and there aren't a lot of them,
12 about flushability issues in New York is what they've got
13 and we don't think there's a reason for us to provide
14 people's names and e-mail and addresses, you know, for
15 purposes of a class action litigation.

16 THE COURT: So --

17 MR. LEVY: Your Honor, if I might respond?

18 THE COURT: Yeah, let me just ask a clarifying
19 question. So in the documents that have been provided,
20 have the names and identifying information of the
21 complainants been redacted?

22 MS. HENN: It has not been provided. When we
23 were exporting the information from the database, we did
24 not export that field. We didn't redact it but we just
25 -- we created this spreadsheet for plaintiff pulling --

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1 you know, it's got the case number, the contact country,
2 the contact date, the item, you know, that's being called
3 about, the date that the record was created --

4 THE COURT: Uh-hum.

5 MS. HENN: -- a description of the issue, you
6 know, the status of the issue, whether P&G responded.
7 And then it's got this fulsome summary of what the person
8 was calling about. So that's more or less the
9 information that was provided.

10 THE COURT: So the numbers of complaints -- so
11 everything having to do with the complaint has been
12 provided except for the identifying information of the
13 complainant?

14 MS. HENN: I believe that's correct, although I
15 don't want to misstate. It's possible there are other
16 fields that might have been -- seemed to us irrelevant or
17 for internal purposes. I'm not aware that there are any
18 fields like that but I don't want to exclude the
19 possibility.

20 THE COURT: Mr. Levy, for class certification
21 purposes, why do you need identifying information?

22 MS. HENN: For the class certification, I don't
23 need to name -- I don't need the contact and identifying
24 information, so that (indiscernible) we don't.

25 But obviously, for the merits it's going to be

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1 very important. They're going to be witnesses in the
2 case.

3 THE COURT: WELL, is there any reason -- and
4 again, I may be forgetting some of the case management
5 order, but is there any reason why we can't defer that
6 until after the class certification issue and we see how
7 the class has been certified and define, if at all, by
8 Judge Weinstein?

9 MR. LEVY: No, we can do that.

10 THE COURT: Okay. So that's how I would like
11 to deal with this at this point and then we can -- as to
12 the original documents, I don't think it's -- Mr. Levy,
13 did you want to say anything more about the original
14 documents or --

15 MR. LEVY: Well, the original -- I won't press
16 for the e-mails or the recordings at this stge. As far
17 as the letters, again all we have is their summaries of
18 what's in the letter. That's not the best evidence of
19 what these customers said. But again, I'm willing to
20 defer that too, if --

21 THE COURT: Okay. Yes, I think that makes
22 sense at this point. So I just want to be sure that I'm
23 noting this down right. That was number 8 --

24 MS. HENN: Uhm.

25 THE COURT: -- request number 8? Well, there

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1 were several. There were 8 and --

2 MR. LEVY: Yeah, it was an interrogatory and it
3 was a few document requests.

4 MS. HENN: Okay. I believe it is document
5 request number 12.

6 THE COURT: Okay.

7 MS. HENN: Document request number 13.

8 MS. DEAN: 13, yes.

9 MS. HENN: And inter -- let's see.

10 MS. DEAN: I believe it's interrogatory number
11 13.

12 MS. HENN: Here it is, interrogatory 13, yes.

13 THE COURT: Okay. I just want to be sure we're
14 clear on the record.

15 MS. HENN: Thank you, your Honor.

16 THE COURT: Okay. So the objections will be
17 deferred until after the class certification.

18 MR. LEVY: Your Honor, I think there's just two
19 more that we want to bring up. One would be on page 14
20 of the letter.

21 THE COURT: Okay.

22 MR. LEVY: This is responding to INDA (ph.).
23 This is on the bottom of page 14.

24 THE COURT: I'm there.

25 MR. LEVY: Okay. Now INDA is a trade

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1 organization of manufacturers of these products and
2 Proctor & Gamble I think has a member who sits on the
3 board and supports INDA and funds INDA.

4 They're using INDA's testing results and
5 qualifications to defend, you know, the flushability of
6 this product. We would like to show that INDA's not only
7 not an independent agency but is -- how much it's
8 beholden to Proctor & Gamble and how much Proctor &
9 Gamble funds it and causes its existence to even exist.

10 So we asked for how much Proctor & Gamble has
11 given to INDA to support it. What they've given in
12 return is one year's membership fee which hardly responds
13 to the question or the thrust of the question. So you'll
14 see that on page 14 and page 15.

15 THE COURT: Yes.

16 MR. LEVY: So this is just a matter of giving
17 us, you know -- they can give us a document saying how
18 much money they've given over the years to INDA if they
19 want to.

20 MS. HENN: And just a couple of points in
21 response, Mr. Levy may have misspoken but he said that
22 Proctor & Gamble relies on testing results and
23 qualifications of INDA. INDA is an industry-membership
24 organization that promulgates standards for what is
25 considered flushable and sort of testing protocol but P&G

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1 does not rely on INDA to test its wipes. P&G tests them
2 internally as we have discussed earlier in this
3 teleconference.

4 We have, as Mr. Levy reported, we provided the
5 most recent year's membership fee. We would be happy to
6 try to find prior year's membership fees. I don't know
7 that we still have that information within P&G but I will
8 try to find out and I would be happy to provide what we
9 can locate and we would ask just that that be confined
10 again to the class period because I think -- frankly, I
11 think with one year's membership fee, Mr. Levy can
12 probably make the point that he's trying to make but if
13 he needs -- you know, it's probably reduced amounts and
14 prior years. If the fee is similar to other things, they
15 tend to go up over time but I can certainly find out if
16 we have any further information. I'm not sure we will be
17 able to find out what was paid in prior years but I can
18 try.

19 MR. LEVY: And funding goes beyond membership
20 fees. I know that, you know, if you joined a country
21 club, you've got a membership fee but you also give other
22 monies to the country club. So funding is a broader
23 term. It's how much money Proctor & Gamble has given to
24 this trade association.

25 MS. HENN: Yeah, I just don't know how to go

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1 about -- I think that it's possible that there have been
2 studies conducted that I don't know if you consider that
3 to be funding, if a study was done in conjunction with
4 INDA and P&G provided funding for that study. That -- I
5 don't know if -- of any other type of funding that might
6 have happened though. I think it's all encompassed in
7 the membership fee other than that.

8 THE COURT: So how do you want to leave that?
9 Will you -- Ms. Henn, will you attempt to find out any
10 other funds that were provided to INDA during the class
11 period?

12 MR. LEVY: Well, your Honor --

13 MS. HENN: I will --

14 MR. LEVY: -- it's beyond the class period,
15 your Honor. It's if, you know, they've given millions of
16 dollars to INDA, I'd like to know that and not restrict
17 that to what they gave them during the class period.

18 THE COURT: I'm sorry. Let me just --

19 MS. HENN: Your Honor?

20 THE COURT: I've got the interrogatory.

21 MS. HENN: Yes.

22 THE COURT: I'm on page 18. It says, "State
23 P&G's relationship with INDA, including," et cetera, et
24 cetera, et cetera, "whether P&G has provided funding to
25 INDA and if so, in what amounts." I don't see a date

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1 specified there. Does that mean that it's -- it reverts
2 back to the default position?

3 MS. HENN: The relevant period.

4 THE COURT: Yes.

5 MS. HENN: (Indiscernible).

6 THE COURT: The default position class period.

7 MR. LEVY: (Indiscernible) considered it, your
8 Honor. I would consider it to how much funding can be
9 given to INDA over the --

10 MS. HENN: Well, except --

11 MR. LEVY: -- since its inception.

12 MS. HENN: -- that the document itself, I
13 believe says -- and Claire, I hope you'll correct me if I
14 am wrong, but I believe the document says, "Unless
15 otherwise specified, each request shall," --

16 THE COURT: Yes.

17 MS. HENN: -- "cover this relevant period, May
18 23rd, 2011 to the present."

19 But the bigger point, I think, your Honor, is
20 that if we can limit this to a reasonable period like the
21 class period, I think Mr. Levy will be able to make
22 whatever arguments he had. It will be representative, of
23 course, of what might have happened in the past but the
24 relevant period is the class period and it will give him
25 information to make whatever arguments he would like to

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1 make.

2 MR. LEVY: Your Honor, I think that's too
3 restricted. I mean I don't think it's going to be a big
4 burden to find out how much money Proctor & Gamble has
5 given to INDA, which is basically one inquiry.

6 THE COURT: But over what period of time? It's
7 unclear what period of time you're requesting?

8 MR. LEVY: Well, since INDA was formed because
9 it was formed, I believe by the -- as the trade
10 association, formed by Proctor & Gamble and other
11 manufacturers, you know.

12 THE COURT: When was it formed? Does anyone
13 know?

14 MS. HENN: I don't know but I don't think
15 Proctor & Gamble formed it. It's an association of non-
16 woven fabrics, so it's -- P&G played a role but it's not
17 the driving -- you know, there are lots of other
18 companies; Kimberly-Clark, for example, in the other
19 case.

20 THE COURT: Uh-hum.

21 MS. HENN: And then also manufacturers of the
22 material. There are lots of -- lots of members. I don't
23 know how far back it goes.

24 Might I make a proposal that we make a

25 THE COURT: Sure.

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1 MS. HENN: -- search and provide information
2 for the class period and if Mr. Levy, you know, once he
3 has that information, feels that there's, you know -- has
4 more information about the founding or anything else that
5 suggests to him that there's relevant information going
6 back further, he could come back and make that case.

7 THE COURT: I'm looking at --

8 MS. DEAN: I'll just note that INDA was founded
9 in 1968, so quite a considerable amount of time ago.

10 MR. LEVY: Well, how about starting when
11 Proctor & Gamble was involved then.

12 THE COURT: Right, and the response --
13 interrogatory response says, "Proctor & Gamble's been
14 involved since 1999," I believe -- "at least 1999. In
15 the past, P&G has also contributed to the cost of
16 specific INDA-sponsored projects, et cetera, related to
17 flushable wipes including field studies, et cetera."

18 MS. HENN: Right.

19 THE COURT: But you weren't able to specify and
20 perhaps that -- if those were in the class period,
21 perhaps that would be a sufficient note. It's just hard
22 to know when those projects took place.

23 MS. HENN: Uh-hum.

24 THE COURT: Would a five-year or a seven-year
25 period capture what we're looking for?

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1 MS. HENN: I think a five-year period would be,
2 you know, the class period plus and again, you know, if
3 there's something highly interesting to plaintiff in that
4 the data that we're -- whatever data we're able to find,
5 we would be happy to talk to them about something more
6 but we think that's sort of a good start. I think what
7 it will show is sort of a typical, annual fee that
8 probably, you know, assuming we can track it down will
9 change but not a lot over the years and plaintiff will
10 get an idea of the sort of type of -- assuming there was
11 a field study in that five-year period, and assuming
12 we're able to figure out how much, if anything, P&G
13 contributed, plaintiff can decide whether that's highly
14 interesting and wants to go much further back or whether
15 that's enough to make the arguments he wants to make.

16 THE COURT: You know, let me suggest this.
17 What about five years plus the three studies that were
18 discussed or the two studies discussed, the California
19 field study and the New Jersey study and the consumer
20 education campaign in Maine? If those took place during
21 the five-year period, that's fine. If not, then just
22 provide that information.

23 MS. HENN: Thank you, your Honor, for that
24 guidance. We'll be happy to try to pull that data.

25 MR. LEVY: Okay. One more, your Honor.

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1 THE COURT: Okay.

2 MR. LEVY: Page 5, document request number 7.

3 THE COURT: Uh-hum.

4 MR. LEVY: What this calls for is whether
5 Proctor & Gamble has assembled in their PR department or
6 the media relations department or any other department,
7 the press clippings, the articles, the press releases
8 that deal with whether Freshmates is indeed flushable or
9 not.

10 So we asked them to search and see if they have
11 these and produce them. Their response is well, Mr.
12 Belfiore should do his own search and go on Google or
13 something and try and track these down. Obviously, he
14 doesn't have the resources that Proctor & Gamble has and
15 Proctor & Gamble, you know, we believe probably has
16 assembled all this in one place. They probably collect
17 their -- any public articles about flushability or
18 Freshmates. So we asked them to find it and produce it.

19 MS. HENN: And just if I may respond, your
20 Honor. This is a request for publicly available
21 documents and we think it's not really an appropriate
22 topic for discovery from a party in litigation. We are
23 not aware of any central repository of press clippings
24 and, you know, we don't think that exists. The place
25 that we would look for those types of things is in -- you

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1 know, if people e-mailed articles around or found things
2 interesting.

3 We have produced information about
4 flushability, so to the extent articles or e-mails and
5 prompted a discussion about the topic, plaintiffs already
6 have that, as far as we were able to find in the
7 documents. I don't think this dispute is really terribly
8 important, given that this information is available to
9 plaintiffs and the public domain. But, you know, we
10 think that the request that we responded to are
11 sufficiently broad to have pulled any kind of relevant
12 discussion of flushability that might have been prompted
13 by publicly available documents but to ask us to sort of
14 go further and find any publicly available articles
15 within P&G's possession, just strikes us as, you know, an
16 unwarranted imposition and cost on P&G.

17 THE COURT: Which number are you on in which
18 page?

19 MS. HENN: This is number -- document --

20 MR. LEVY: Page 5, document number 7.

21 MS. HENN: Number 7.

22 THE COURT: Okay. All right. So P&G's
23 position is that there is no easy way to gather this
24 information together?

25 MS. HENN: That we don't know of any place that

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1 -- correct, that P&G doesn't, to our knowledge, save
2 these types of articles in one place and we cited some
3 cases observing that discovery need not be required of
4 documents of public record which are equally accessible
5 to all parties.

6 THE COURT: Right, I saw that. But I think the
7 question really is whether or not there's a marketing
8 department or another department that might have this
9 information or not and if it's burdensome to produce,
10 then I think the fact that it's easy -- that it's no more
11 -- it's no easier for P&G to obtain than it is for
12 plaintiff would bear -- would carry some weight. And
13 that's what I am trying to understand.

14 MS. HENN: Right. And I guess to respond to
15 your question, your Honor, this is a small product. It
16 doesn't get a lot of attention within Proctor & Gamble
17 and I'm not aware of anyone who sort of tracks this and
18 has it easily available.

19 So I also think conversely that the search we
20 already did for documents about flushability, to the
21 extent those types of things were interesting to people
22 and they e-mailed around, plaintiff would have had that.
23 So, you know, requiring us to go back and try -- I don't
24 even know exactly where we would search but to do more
25 when these documents are equally available to plaintiff,

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1 in fact, probably more available. I think a more
2 targeted way to find these is Google than looking at an
3 enormous corporation like Proctor & Gamble just because
4 we don't have a single place where these are all
5 collected.

6 THE COURT: And again, this doesn't go to the
7 class allegations, as much as it does to the merits. Is
8 that right?

9 MR. LEVY: This probably goes to both but if I
10 am hearing a representation from Ms. Henn that she knows
11 that there's no place at the Freshmates division or
12 whatever, where they have assembled these --

13 THE COURT: Right.

14 MR. LEVY: -- type of press releases and press
15 clippings, then I would accept that. But I don't know if
16 I've heard that or not.

17 THE COURT: I've heard that.

18 MS. HENN: Yeah, I'm not aware of any place
19 like that. I mean, I think people might have seen an
20 article and e-mailed it to their colleague and I think
21 the search that we already did would have pulled that up
22 to the extent it's there.

23 THE COURT: What I am hearing is that there's a
24 -- that it appears that a diligent search has been made
25 or if it hasn't, that it will be and there's no central

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1 repository.

2 That to the extent this is necessary for class
3 certification, I think plaintiff is -- it's less
4 necessary, I think to class certification, than it is to
5 the merits. And my guess is that once the class issue is
6 resolved, depending on where we go from that, plaintiff
7 can ask, you know, at depositions, can pursue this more
8 if it is an issue, although it sounds to me as though
9 we've heard a fairly definitive answer from Ms. Henn.

10 MS. HENN: Yeah, and I can go back again just
11 to ask that very targeted question but I do not expect
12 the answer to be different and if it is, I will agree to
13 let Mr. Levy know.

14 THE COURT: Okay. I think that resolves it.

15 I have some people waiting for a search warrant
16 but I don't want to put you off anymore. Do we have any
17 other issues?

18 MR. LEVY: No, I think that's it, your Honor.

19 MS. HENN: Yeah, nothing from defendant, your
20 Honor.

21 THE COURT: Okay, good. Do we need to set up
22 another conference date or you basically just kicking
23 along now and don't need me until you tell me you do?

24 MR. LEVY: Well, we have some ten-day limits,
25 so if we could set one up beyond that ten-day limit, just

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1 to see where we are, that would probably be good.

2 MS. HENN: And we'd be happy to do that or we'd
3 be happy to wait and see if there are any issues that
4 crop up and reach out, if so.

5 THE COURT: I think I would wait.

6 MS. HENN: That's fine, your Honor.

7 THE COURT: Because where my schedule is right
8 now, it's going to be hard to squeeze you in but I think
9 some things will probably open up between, you know, now
10 and then and I'll know who to bump if you tell me you're
11 having a serious problem. In other words, I --

12 MS. HENN: Thank you very much, your Honor. We
13 appreciate your Honor's time in helping us work through
14 these issues.

15 THE COURT: Okay, good luck.

16 MR. LEVY: Thank you, your Honor.

17 THE COURT: All right.

18 MS. HENN: Thank you.

19 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 11th day of February, 2015.


Linda Ferrara

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